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No. 01-791

In the Supreme Court of the United States

CITY OF ST. PAUL, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

The National Housing Act confers upon the Secretary of Housing and Urban Development the "power to deal with, complete, rent, renovate, modernize, insure, or sell for cash or credit, in his discretion, any properties conveyed to him" following the default of a homeowner with a HUD-insured mortgage under the Single Family Mortgage Insurance Program. 12 U.S.C. 1710(g). The same Section of the Act also gives the Secretary the power to "sell real * * * property acquired by the Secretary pursuant to the provisions of this chapter on such terms and conditions as the Secretary may prescribe." In an effort to ensure that such property is sold as quickly as possible at affordable prices to purchasers who will be owner-occupants, the Secretary has issued regulations providing that the property will not be renovated by HUD prior to sale but rather "will be offered for sale in 'as-is' condition." 24 C.F.R. 291.100(c).

The question presented is:

Whether the court of appeals correctly held that principles of "conflict preemption" and intergovernmental immunity barred petitioner from applying its nuisance-abatement ordinance to force HUD—under threat of demolition—to make extensive repairs to a HUD-acquired house.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-7a) is reported at 258 F.3d 750. The opinion of the district court granting a permanent injunction (Pet. App. 8a-21a) is unreported. The opinion of the district court denying a stay or modification of the injunction (Pet. App. 22a-25a) is reported at 193 F.R.D. 640.

JURISDICTION

The judgment of the court of appeals was entered on August 2, 2001. The petition for a writ of certiorari was filed on October 31, 2001. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Congress created the Single Family Mortgage Insurance Program as part of the National Housing Act, 12 U.S.C. 1701 *et seq.*, to further the national goal of "a decent home and a suitable living environment for every American family." 12 U.S.C. 1701t. As part of its mandate to assist in the provision of affordable housing, the Department of Housing and Urban Development (HUD) insures mortgages on single-family houses. See 12 U.S.C. 1709. By protecting mortgagees against default losses, HUD encourages mortgage companies to lend money to home buyers who otherwise might not qualify for conventional mortgage loans. That, in turn, serves Congress's goal of increasing the supply of affordable housing throughout the nation and, in the process, "preserv[ing] neighborhoods and communities." 56 Fed. Reg. 13,996 (1991).

Congress gave HUD broad authority to dispose of houses it acquires when insured mortgages are defaulted. 12 U.S.C. 1710(g) ("[T]he Secretary shall have power to deal with, complete, rent, renovate, modernize, insure, or sell for cash or credit, *in his discretion*, any properties conveyed to him in exchange for debentures and certificates of claim as provided in this section.") (emphasis added). Indeed, in 1998, Congress conferred an even broader authority on the Secretary by adding a sentence to that same provision of the National Housing Act: "The Secretary may sell real * * * property acquired by the Secretary pursuant to the provisions of this Act *on such terms and conditions as the Secretary may prescribe.*" Act of Oct. 21, 1998, Pub. L. No. 105-276, § 601(d), 112 Stat. 2674 (emphasis added); see Pet. App. 18a.

In the past, HUD's policy was to make immediate extensive repairs to houses it acquires through the insured mortgage program, with the goal of completely renovating the houses prior to marketing them. Pet. App. 12a. HUD, however, abandoned that practice in the 1970's, for several reasons. It found that the repairs were costly for the Single Family Mortgage Insurance Fund, which insured the properties, and were often undone by acts of vandalism while the houses were still vacant and being marketed. HUD determined, as well, that it was frequently defrauded by contractors hired to perform the repairs. It also found that monitoring the construction process was expensive and placed a burden on its limited staff. Finally, prospective buyers often preferred to pay a lower price for the property and renovate the houses to their own liking. *Id.* at 13a & n.2; see 56 Fed. Reg. at 13,997.

Based on the extensive difficulties created by its policy of repairing houses before disposing of them, HUD initially changed its internal guide, the Property Disposition Handbook, to reflect a preference for sales in an "as is" condition and later, in 1991, promulgated regulations. Those regulations provide that houses acquired by the Secretary under the Program would not be renovated but rather "will be offered for sale in 'as-is' condition." 24 C.F.R. 291.100(c)(1) and (2); see 24 C.F.R. 291.100(c)(3). Thus, rather than repairing houses, HUD seeks to sell them as quickly as possible at affordable prices to owner-occupants and does not permanently retain title to the properties as rental units. See 56 Fed. Reg. at 13,996. Because HUD owns tens of thousands of single-family houses throughout the country at any given time as a result of the Program, Pet. App. 5a, HUD does not market the

properties itself. Instead, it contracts with several private firms to market the properties it acquires.[1]

2. a. On April 22, 1999, the Secretary acquired title to a house located at 1328 Minnehaha Avenue West in St. Paul, Minnesota, which was financed with a HUD-insured mortgage. Pet. App. 8a. The mortgagor who had occupied the house defaulted on the HUD-insured mortgage and vacated the premises sometime before August 1998. C.A. App. 25, 26. Homeside Lending, the mortgagee, then foreclosed on the property. *Id.* at 26. Because the mortgage was insured by HUD, Homeside Lending submitted a claim to the Single Family Mortgage Insurance Fund for its losses and, as part of the claims process, conveyed title to the house to the Secretary. *Id.* at 91, 92.

After HUD acquired the house at 1328 Minnehaha, the HUD contractor in St. Paul, First Preston Management, Inc., conducted an inspection of the property. Pursuant to HUD's current policies, First Preston corrected two immediate hazards. It capped the natural gas lines in the house and disconnected the electricity. It also locked all of the windows and doors in the house in order to prevent vandalism, mowed the grass and, later in the year, shoveled the snow from the sidewalk and driveway. Pet. App. 2a. Upon acquiring the

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[1] Although HUD no longer renovates the houses before selling them, HUD does repair any immediate hazards. The HUD contractor is required to perform an initial inspection of all houses and, within 24 hours of discovery, correct any condition that presents a health or safety hazard to the public or to the property. C.A. App. 19, 22, 23, 92, 93. The HUD contractor also must routinely inspect the property and take all necessary action to maintain it in a presentable condition and to prevent any deterioration. *Id.* at 93. For example, trash must be removed, grass must be cut, and snow must be shoveled. *Id.* at 22.

house, HUD developed a marketing plan for the property. Following HUD policy, First Preston obtained an appraisal and began to advertise the house for sale "as is." *Ibid.*

b. In 1991, petitioner enacted an ordinance authorizing it to declare any vacant property in St. Paul to be a "nuisance building" if, after an inspection, it is found to contain "multiple housing code or building code violations." Pet. App. 80a. When a property has been identified as a "nuisance building," the ordinance authorizes a City inspector to order the owner of the property to undertake whatever action the City official deems necessary to abate the "nuisance." *Id.* at 90a-92a. If the abatement ordered by a City inspector is not completed within the time specified by the official, the St. Paul City Council is authorized, after a hearing, to order the owner to abate the "nuisance." *Id.* at 92a-93a. If the owner does not comply with the City Council's order to abate, the City Council can authorize the City to demolish the building and assess the cost of demolition against the property. *Id.* at 93a-94a; see generally *id.* at 9a-10a. Under the ordinance, the City does not need the permission of the property owner to demolish the building and assess the costs to the property owner, and there is no required judicial proceeding before the demolition. *Id.* at 93a-94a.

As early as August 1998, eight months before HUD acquired title to the property at 1328 Minnehaha, petitioner was aware that the house met the definition of a vacant building under its ordinance, because it was unoccupied and not in compliance with the code. C.A. App. 25. Petitioner, however, did not commence nuisance abatement proceedings against Homeside Lending, the registered owner of the property at that time. Petitioner also did not serve on Homeside Lending a

"New Owner Vacant Building Registration Form," a requirement under its ordinance. *Id.* at 25, 26. But when petitioner learned that the deed to the house had been conveyed to HUD on April 22, 1999, and recorded on June 2, 1999, petitioner promptly sent HUD the vacant building registration form. *Id.* at 26. On July 22, 1999, petitioner inspected the house for code violations. *Ibid.*

On August 6, 1999, petitioner sent the Secretary in Washington, D.C., an "Order to Abate Nuisance Property." Pet. App. 9a. Petitioner's Order stated that a City inspector had determined that the house was a "nuisance building" under petitioner's ordinance. *Ibid.* The Order provided that if the Secretary did not correct the building's conditions by September 7, 1999, petitioner would begin a process to "demolish and raze the home." *Ibid.* On August 9, 1999, three days after the Order was issued, a City inspector posted a notice on the house declaring it to be a "nuisance building." C.A. App. 27. The notice was posted while HUD was actively marketing the property. *Id.* at 93.

On August 26, 1999, an inspector having conducted a comprehensive code compliance inspection of the house, petitioner detailed in a letter to the Secretary the repairs the inspector determined to be necessary to correct the "nuisance" condition. Pet. App. 2a, 9a. The repairs required by the City inspector were not limited to correcting immediate health and safety problems. HUD was required, *inter alia*, to "replace all floor coverings, including carpet, completely rebuild the garage, install new storms and screens for all windows and doors, repaint the exterior and interior of the house, and rewire the basement with switches and outlets." *Id.* at 2a. The repairs that petitioner demanded the Secretary make to the house constituted an extensive

renovation of the property with an estimated cost to HUD of $30,000 to $40,000. *Ibid.*

After it conducted the code compliance inspection of the house, petitioner notified the Secretary that HUD was required to post a $2000 performance bond with petitioner and apply for building permits if it wanted to extend the deadline of September 7, 1999, for abating the "nuisance." Pet. App. 2a. HUD was told that if it posted the performance bond and obtained building permits, HUD would be allowed six months within which to make the repairs, and petitioner would halt its planned demolition of the house. C.A. App. 28.

On September 10, 1999, a City official reinspected the house and found that none of the repairs ordered by petitioner had been made by the Secretary and that HUD had not posted the performance bond. C.A. App. 28. The City inspection official then requested the City Council Secretary to schedule a hearing on whether petitioner should demolish the house. The Council Secretary scheduled a legislative hearing before a City official for October 19, 1999, and a public hearing before the City Council for October 27, 1999. Pet. App. 9a-10a.

On October 27, 1999, HUD obtained a buyer for the house, Keith P. Burg of St. Paul, who agreed to pay $25,009. Pet. App. 3a. Burg was aware of the pending code compliance orders regarding the property and informed HUD that he was able and willing to make all of the repairs required by petitioner before moving into the house. He planned to renovate the property in the fall of 1999 and occupy the house as his principal residence by winter. *Id.* at 3a, 10a.

That same day, the City Council conducted a public hearing to consider whether to demolish the house. Prior to the hearing, Burg talked to City officials, including the legislative hearing officer, about his offer to

purchase the house and his ability to begin making repairs to it. At the hearing, a representative of First Preston appeared and informed the City Council of Burg's offer to purchase the house and of his ability to make the repairs ordered by petitioner. Pet. App. 10a.

The City Council adopted a resolution ordering that by November 15, 1999, the Secretary must complete all of the repairs to the house ordered by the City inspector in his August 26, 1999, letter to the Secretary. Pet. App. 3a, 10a. The resolution authorized City officials to demolish the house, fill the site, and assess HUD for the cost of demolition if the repairs by HUD were not made by the November 15 deadline. *Id.* at 10a; C.A. App. 124-125.

Following the City Council vote, Burg contacted the St. Paul Mayor's Office in an attempt to prevent demolition of the house. In addition, HUD requested in writing that the City Council reconsider its order to demolish, but the Council refused to reopen the matter. Pet. App. 3a. On December 6, 1999, petitioner informed HUD it would proceed with the demolition. *Ibid.* On February 8, 2000, petitioner's demolition contractor obtained a permit from petitioner to raze the house. *Ibid.*

3. In light of the looming demolition, the United States brought this action against petitioner. On February 14, 2000, the district court granted the motion of the United States for a temporary restraining order to prevent demolition. The parties then filed cross-motions for summary judgment. Pet. App. 10a-11a.

The district court granted summary judgment in favor of the United States, finding that application of petitioner's ordinance would frustrate the goals and objectives of HUD in carrying out the Single Family Mortgage Insurance Program. It held that HUD is

immune from petitioner's enforcement of its ordinance and that such application of petitioner's ordinance is preempted by federal housing laws. Pet. App. 11a-20a. The district court issued a permanent injunction barring petitioner from "ordering the Secretary * * * to abate any nuisance conditions that the City has identified in any property owned by HUD," from "demolishing as a nuisance building any structure located on a property owned by the Secretary," and from making "any mandatory inspections that would hinder the use or transfer of HUD-owned properties." *Id.* at 21a.

Petitioner filed a notice of appeal and moved to stay the injunction pending appeal. The district court denied petitioner's motion for a stay, Pet. App. 22a-25a, and the Secretary then closed on the property with Burg. *Id.* at 3a.

4. The court of appeals affirmed, holding that application to HUD of petitioner's nuisance abatement code would impermissibly interfere with the operation of the National Housing Act. Pet. App. 1a-7a. The court traced the history of HUD's practices of selling houses after default. The court observed that, perhaps as a result of HUD's experience with repairing the house at issue in *Burroughs* v. *Hills*, 741 F.2d 1525 (7th Cir. 1984), cert. denied, 471 U.S. 1099 (1985), "and many other similar experiences," HUD had abandoned its practice of holding houses prior to sale for the substantial period of time necessary to make extensive repairs. Pet. App. 4a-5a.[2] Having "determined that its previous practice of substantially repairing homes was a failure," HUD switched to selling houses "on an 'as is'

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[2] In *Burroughs*, the value of a property fell from $40,000 to $1 during the 18 months that HUD owned it. Pet. App. 5a (citing *Burroughs*, 741 F.2d at 1527).

basis, without repairs or warranties." *Id.* at 5a-6a (quoting HUD, *Property Disposition Handbook*, Directive No. 4310.5 (May 1994)) (*Handbook Directive No. 4310.5*); see 24 C.F.R. 291.100.

The court of appeals rejected petitioner's argument that 42 U.S.C. 3535(i)(1), which provides that "any * * * acquisition [by HUD] of real property shall not deprive any State or political subdivision thereof of its civil or criminal jurisdiction in and over such property," authorizes petitioner to apply its nuisance ordinance to HUD. The court noted that Section 3535(i)(1) applies by its terms only when HUD purchases a property by "foreclosure or any other sale." Pet. App. 7a (quoting statute). The court explained that "HUD * * * did not purchase [the property at issue in this case] at a foreclosure or other sale." *Ibid.* Citing *United States* v. *Chester*, 144 F.2d 415 (3d Cir. 1944), the court explained that the purpose of Section 3535(i)(1) was to make clear that federal property acquired by foreclosure or other sale did not become a "'federal enclave' so as to deprive the host state of all civil and criminal jurisdiction." Pet. App. 7a. There had been no claim in this case that the property at issue was a federal enclave.

The court of appeals concluded that "HUD must be able to carry out its federal functions in a relatively uniform fashion" and that

> HUD cannot be subjected to a vast multitude of municipal ordinances throughout the United States which ordinances require the federal government to spend federal funds, post bonds, and obtain a local building permit, with HUD suffering the prospect of destruction of federal property for failure to comply with local ordinances.

Pet. App. 7a. Accordingly, the court held that application to HUD of petitioner's ordinance impermissibly "retards, impedes, burdens and interferes with the operations of a constitutional federal law, the National Housing Act." *Ibid.* The court therefore affirmed the injunction issued by the district court. *Ibid.*

ARGUMENT

The decision of the court of appeals is correct and does not conflict with any decision of this Court or any other court of appeals. Accordingly, further review is not warranted.

1. To fulfill the national policy of "a 'decent home and a suitable living environment for every American family,'" 56 Fed. Reg. at 13,996 (quoting 12 U.S.C. 1701t), the Secretary's current regulations provide for selling HUD-acquired properties "in 'as-is' condition, without repairs or warranties." *Id.* at 13,997; see 24 C.F.R. 291.100(c). In the mid-1970's, HUD began to institute the policy of selling acquired houses "as is" and without repairs, because of its unsuccessful experience with its former policy of renovating those houses prior to sale. HUD later issued regulations formally adopting the successor policy. As the preamble to the 1991 rulemaking explains:

> First, while properties are on the market, they are vacant and subject to vandalism. In some cases, expensive repairs, paid for out of the insurance fund, were undone in a single act of vandalism. Secondly, HUD frequently found itself the victim of fraud by those who contracted to perform repairs. Repairs that supposedly had been done had to be repeated at extra expense and inconvenience to the buyers. The staff-intensive monitoring necessary to reduce the risk of fraud is prohibitive, considering the size of

> the staff in many HUD field offices. Finally, some purchasers of HUD-acquired properties plan to do extensive renovations. Repairs performed by HUD interfere with the renovation plans of purchasers, who prefer to pay a lower price for a property and make repairs at the same time they are renovating.

56 Fed. Reg. at 13,997. In contrast with its former policy, HUD now has a "policy of returning the properties to the market as quickly and cheaply as possible." *City of Country Club Hills* v. *HUD*, No. 99 C 7139, 2001 WL 1117276, at *6 (N.D. Ill. Sept. 17, 2001).

Application to HUD of the St. Paul ordinance is preempted, both because it "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress," *Geier* v. *American Honda Motor Co.*, 529 U.S. 861, 873 (2000); see *Crosby* v. *National Foreign Trade Council*, 530 U.S. 363, 373 (2000), and because it "actually conflicts" with the federal regulation, *Geier*, 529 U.S. at 874. Congress broadly delegated to the Secretary the power, in his discretion, to "deal with, complete, rent, renovate, modernize, insure, or sell for cash or credit" the HUD-acquired houses and to sell such houses "on such terms and conditions as the Secretary may prescribe." 12 U.S.C. 1710(g). The Secretary has "prescribed" the "conditions" for sale of property in 24 C.F.R. 291.100(c), which provides that houses acquired by HUD following default will be sold quickly in "as is" condition. Petitioner's ordinance would make it all but impossible for HUD to accomplish the primary purpose of the "as is" regulation—to bring houses to market quickly. In addition, petitioner's ordinance would require HUD to make the repairs the City deems necessary, rather than those that HUD deems necessary, and it would require

HUD to "find buyers within time frames set by the" City or be forced to post performance bonds. Pet. App. 17a. Petitioner's ordinance would thus stand as an obstacle to the federal policy and actually conflict with the HUD regulation. See *Geier*, 529 U.S. at 874-875 (state tort suit actually conflicted with policy of federal regulatory standard); *City of New York* v. *FCC*, 486 U.S. 57, 64 (1988) ("The statutorily authorized regulations of an agency will pre-empt any state or local law that conflicts with such regulations or frustrates the purposes thereof."). Its application to HUD is therefore preempted.

Contrary to petitioner's assertions (Pet. 21, 22), "conflict preemption" may occur without an express statement of intent to preempt. *Geier*, 529 U.S. at 884 ("conflict pre-emption is different in that it turns on the identification of 'actual conflict,' and not on an express statement of pre-emptive intent"); *Booker* v. *Edwards*, 99 F.3d 1165, 1168-1169 (D.C. Cir. 1996) (allowing HUD to sell property acquired after default, without having to comply with local law entitling tenant to right of first refusal).[3] Petitioner cites (Pet. 21) this Court's

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[3] Petitioner's assertion that there is no conflict between its ordinance and HUD's regulation, Pet. 16-17, is based on a misunderstanding of HUD's Handbook on Property Disposition, an internal agency guide. Petitioner cites a provision of the Handbook that permits repairs to be made when the "property needs repair to comply with actively enforced local codes or unrepaired sales are prohibited by such codes or local ordinance." Pet. 16 (quoting *Handbook Directive No. 4310.5*, § 10-11A(4)). But the Handbook clarifies that repairs may be done for that reason "only when the necessary staff and contractor resources are available [and] the repairs are of a limited nature and can be accomplished expeditiously." C.A. App. 61. Moreover, HUD's authority to repair a house, as the Handbook makes clear, is entirely discretionary: "Field Offices *may* undertake limited repairs prior to selling

statement in *Solid Waste Agency* v. *Army Corps of Engineers*, 531 U.S. 159, 172 (2001), that "[w]here an administrative interpretation of a statute invokes the outer limits of Congress' power, we expect a clear indication that Congress intended that result." This case, however, is not one in which an agency has approached "the outer limits of Congress' power." The Property Clause of the Constitution provides that "[t]he Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the * * * Property belonging to the United States," U.S. Const. Art. IV., § 3, Cl. 2, and the federal power under that Clause is plenary. *Utah Div. of State Lands* v. *United States*, 482 U.S. 193, 200-201 (1987). This Court has "repeatedly observed that '[t]he power over the public land thus entrusted to Congress is without limitations.'" *Kleppe* v. *New Mexico*, 426 U.S. 529, 539 (1976) (quoting *United States* v. *City & County of San Francisco*, 310 U.S. 16, 29 (1940)). When federal law regulating the disposition of federal property conflicts with state law, the state law must give way. *California Coastal Comm'n* v. *Granite Rock Co.*, 480 U.S. 572, 580-581 (1987).

Petitioner further contends (Pet. 17, 22) that preemption is undermined by HUD's statement in the notice of proposed rulemaking that its proposed rule had no federalism implications under Executive Order

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certain properties," and "[t]he repair and sell technique should be used on *an exception basis only* and should not be used where such sales would adversely affect the office's performance indicators. *Id.* at 60 (emphasis added). The Handbook thus gives HUD some discretion to make limited repairs; nothing allows it to make substantial repairs such as those required under petitioner's ordinance or its letter of August 29, 1999, requiring renovations to the property in this case.

No. 12612, 3 C.F.R. 252 (1987). The Executive Order addresses federalism concerns in the relationship between the States and the federal government. See Pet. App. 62-68. The municipal ordinances at issue in this case do not implicate that relationship. In any event, petitioner's contention is mistaken, because intent to preempt is not necessary for conflict preemption. *Geier*, 529 U.S. at 884. In addition, the Executive Order expressly states that it is intended only to "improve the internal management of the Executive branch," and not to create any rights enforceable against the United States, its agencies, or its officers. Pet. App. 68.

Similarly, principles of intergovernmental immunity prevent petitioner from applying its local regulatory requirements to federally owned property. "It is well settled that the activities of federal installations are shielded by the Supremacy Clause from direct state regulation unless Congress provides 'clear and unambiguous' authorization for such regulation." *Goodyear Atomic Corp.* v. *Miller*, 486 U.S. 174, 180 (1988) (citing *EPA* v. *State Water Res. Control Bd.*, 426 U.S. 200, 211 (1976); *Hancock* v. *Train*, 426 U.S. 167, 178-179 (1976); *Mayo* v. *United States*, 319 U.S. 441, 445 (1943)). That immunity exists not only for federal installations or enclaves, but more broadly for federal instrumentalities and property. See, *e.g.*, *M'Culloch* v. *Maryland*, 17 U.S. (4 Wheat.) 316, 331 (1819) (federally incorporated bank); *Mayo* v. *United States*, *supra* (federally purchased fertilizer).

2. Petitioner contends (Pet. 14-15) that the decision of the court of appeals conflicts with the Seventh Circuit's 1984 decision in *Burroughs*. That contention is mistaken. *Burroughs* involved a damage action brought by neighbors of a HUD-acquired building

against HUD officials and the local HUD contractor who managed the building. The district court held that no such action could be brought.[4] The Seventh Circuit affirmed that decision, applying the analysis of implied private rights of action under *Cort* v. *Ash*, 422 U.S. 66 (1975), and concluding that there was no such action under the housing laws that allowed neighbors of a HUD-acquired house to sue for damages. Although the court of appeals did state in passing that, under the then-current scheme, "HUD must conform to construction codes, etc., of local law just as the previous but now foreclosed mortgagors had to do," the court added immediately thereafter that "[t]he existence of such a policy of law is not in dispute and is illustrated by quotes from HUD documents which need not be detailed." 741 F.2d at 1529.

The Seventh Circuit's decision in *Burroughs* does not conflict with the Eighth Circuit's decision in this case. First, the question before the court in *Burroughs* was not whether HUD was required to follow all local housing laws, but whether private individuals had a private right of action for damages. The Seventh Circuit's holding in *Burroughs* that there was no such private right of action has nothing to do with the issue in this case. Second, even the Seventh Circuit's dicta in *Burroughs* regarding HUD's compliance with requirements of local law were prefaced with the statement that that issue was "not in dispute." The court's dicta

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[4] Petitioner focuses most of its attention (Pet. 10-13) on the district court's decision in *Burroughs*. The district court's holding that no private right of action was available has no bearing on the issue decided by the Eighth Circuit in this case. In any event, further review would not be warranted to address any tension that might exist between some of the statements in the district court's decision in *Burroughs* and the court of appeals' decision here.

on the issue accordingly clearly do not amount to a definitive ruling on the issue. Finally, the Seventh Circuit's dicta in *Burroughs* were also expressly premised on then-current "HUD documents." HUD's position on the issue has changed substantially since *Burroughs*, as documented by the regulations that now provide for a preference for sale in "as is" condition. Compare 24 C.F.R. 291.100(c) (properties "will be offered for sale in 'as-is' condition') with 741 F.2d at 1536 (quoting then-current HUD handbook statement that "[t]he overall objective is to (a) place properties in first-class condition to create maximum sales appeal at the highest obtainable sales price"). The legislative context has changed as well, with the enactment of the new legislation in 1998 further clarifying that "[t]he Secretary may sell real * * * property * * * on such terms and conditions as the Secretary may prescribe." 12 U.S.C. 1710(g).

Petitioner also errs (Pet. 18) in contending that in practice the Eighth Circuit's rule means that "HUD properties will operate under different rules in neighboring cities that function as one economic unit." HUD's "as is" sale policy applies nationwide, including within the Seventh Circuit. Indeed, as the recent decision in *Country Club Hills* demonstrates, district courts within the Seventh Circuit apply the same rule as did the Eighth Circuit here. And, of course, nothing in the decision below would prevent petitioner from applying its ordinance to the property after it has been conveyed by HUD to private ownership.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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